Supreme Court of the United States

A. J. DAGGS,
Appellant,

vs.

No. 1[illegible]

THE PRESIDENT AND DIRECTORS OF THE FARMERS' BANK,
Corporation, Appellee.

Appellants' Reply to Appellee's Opposition Brief to Appellants' Motion Suggesting Diminution of Record and for Certiorari.

A. J. DAGGS,
Attorney for Appellants.

IN THE

Supreme Court of the United States.

R. E. DAGGS,
A. J. DAGGS,
Appellants,

vs.

THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*

No. 138.

Appellants' Reply to Appellee's Opposition Brief to Appellants' Motion Suggesting Diminution of Record and for Certiorari.

Appellee assumes in his position that the court below allowed the appeal, and that appellants having failed to file their motion in time to have the statement of facts come along with the papers, or together with the transcript, or come up with the appeal, is therefore too late.

Appellee then assumes that the court below has no power after judgment to enter a finding of fact after appeal is taken.

Both positions are erroneous.

The state of facts assumed are not the facts in this case.

Statement of the Facts.

Appellants applied to the Chief Justice of Arizona for allowance of appeal and was refused. An application was then presented to Justice McKenna of this court and was allowed.

"And now to wit on June 6, A. D. 1898, it is ordered that the appeal be allowed as prayed for.
[SEAL] "Joseph McKenna,
"Justice of Supreme Court, U. S."

Rules of this court require transcript to be filed in this Court in sixty days after allowance of appeal, which was done, as appears by appellants' motion. Rule 9, subdivision 4, rules of this Court.

At time this appeal was allowed Supreme Court, Arizona Territory, was not in session and did not meet again until Jan. 1899. Par. 599, Rev. Stat. Arizona is as follows:

"The session of the Supreme Court shall hereinafter in each and every year be held at the seat of Government, commencing on second Monday in each year."

No one judge has the power to make a statement of facts in the nature of a special verdict and certify rulings on admission or rejection of evidence when excepted to. This must be done by the court in *Banc.*

Act Congress, April 7, 1874, Chap. 80, 1 Sup. R. S. 13, is as follows:

"Provided that an appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict and also the rulings of the court on the admission and rejection of evidence when excepted to, shall be made and certified by the court below and trans-

mitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

This Court has said also:

"The statement of facts contemplated by the statute is one to be made by the Supreme Court, from whose judgment the appeal is taken."

Haws v. Victoria etc. Mining Co., 160 U. S. 303, reading page 313.

Appellants must, and did wait until Supreme Court of Arizona met second Monday in January, 1899.

At the opening of court, second Monday of January, A. D. 1899, appellants by oral motion (the usual and customary practice in such matters in that court) ask the court to make the statement of facts, etc., and certify the rulings of the court on the evidence, etc., etc., in this case, and the court intimated it would be done thereafter, at same term, and on May 31, 1899, the court not having yet made the papers above referred to, made and filed their notice and motion asking the court to make and certify statement, etc., and certify rulings on evidence, and when the court met appellants called up their motion and ask for ruling on June 1, 1899, and on June 2, pressed again for ruling on their motion, when the court made the following order: "In this cause it is ordered that the motion for the court to sign and file statement of facts filed herein by plaintiff in error be submitted," and immediately made the following order:

"It is ordered that this court stand adjourned *sine die*."

Thereafter on October 30, A. D. 1899, the court below held a special session of court, and again appellants pressed for rulings on their motion already submitted

June 2, 1899, and the court on November 1, A. D. 1899, made the following order:

"It is ordered that this court stand adjourned until January 6, 1900."

Thereafter on November 2, A. D. 1899, there was filed in Supreme Court of Arizona a paper styled "Statement of Facts in the Nature of a Special Verdict," in this cause, and dated November 1, A. D. 1899, and said paper is now on file in the court below as a part of the record in this case. Appellants, as soon as sufficient data and information could be obtained to enable them to act, made and filed on November 26, A. D. 1899, their motion suggesting diminution of the record.

This appeal having been allowed by this court, and the papers filed in this court within the rules and practice of this court and its jurisdiction over the case attached, and this paper now on file in the court below being an important part of its record, the question is, can this court aid its jurisdiction by any means and perfect its records so as to be able to pass on the case?

It has power to issue all writs necessary to its jurisdiction.

Rev. Stat., U. S., Sec. 716.

This includes a writ of certiorari.

It is not only proper, but it is the duty of appellant to bring into this court every paper necessary or proper in aid of its jurisdiction, and that by certiorari.

May, Supreme Court, U. S., Practice, 305.
Hoskins v. Fisher, 125 U. S., 217, reading pages 223 and 224.
M., K. & T. R. R. Co. v. Dinsmore, 108 U. S., 30.
May, U. S. Practice, 305.

Certiorari lies to perfect the record even after the case is submitted. This court will continue the case and order certiorari for record when justice can not be done without it.

Morgan v. Curtenius, 19 How., 8.

This paper being a paper the inferior court must make, and taking the place of the evidence in the case, it becomes a very important paper, and should the inferior court refuse to make this paper, this court has the power by mandamus to compel it to make and certify a statement, etc., like it would have to compel the making and signing of a bill of exceptions, it being the *legal duty* of the inferior court to make it.

Ex parte, Cram., 5 Pet., 190.
Chautauqua Iron Co., Petitioners, 128 U. S., 544, 557.
Ex parte, Cutting, 94 U. S., 14, 19, 21.
Ex parte, Milwaukee R. R., 5 Wall., 825.
155 U. S., 303.
Noble v. Union R. R., 147 U. S., 165.
Authority might be multiplied indefinite.

Hence there can be no doubt about the power of this court to reach out and perfect its records even to compelling the making of a statement of facts and exceptions and then bring it up.

Appellee's Mistaken View of the Law.

Appellee invokes the case of Cohn v. Daley, 174 U. S., 539, decided under the laws of Arizona, as it stood in 1892, which have been repealed by the act of the Nineteenth Legislative Assembly, No. 71, in 1897.

Under the latter act the case at bar was taken from the

District Court to the Supreme Court of Arizona, and which last mentioned act does not require a statement of facts or finding of facts, nor any bill of exceptions whatever. The parts that apply to this point are as follows:

"SEC. 2. The clerk of the District or Circuit Court, as the case may be, when an appeal or writ of error is taken from said Court to Supreme Court of Territory, shall certify and transmit the entire record, including the original papers on file in his Court and all minute orders in the case, to the Supreme Court of the Territory, and it shall not be necessary for the plaintiff in error, or appellant, to file with the Supreme Court any transcript, assignment of errors, or other papers, except as herein provided."

"SEC. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of error except as herein provided."

"SEC. 8. All acts and parts of acts in conflict with this act are hereby repealed."

Act approved March 18, A. D. 1897.

Judgment in this case was rendered and entered November 12, A. D. 1896.

That citation instead of applying has no application, and moreover the law therein quoted stands repealed, and was repealed when this case was appealed to Supreme Court of Arizona, and therefore there is no statement of facts or bill of exceptions from the District Court of Arizona taken to the Supreme Court thereof (so also the law requiring statement of facts to be made thirty days after judgment is rendered was not passed until March 16, A. D. 1897, nearly five months after judgment was rendered, November 12, 1896, this accounts for the quotation without citation where the law could be found).

Referring again to the making of a statement of facts and certifying the objections and exceptions to the rulings in the case to this court as shown, *supra*, it becomes doubly important to have those two papers made, for that this court is limited to the question of whether the statement of facts will sustain the judgment and cannot go into the evidence to see whether it sustains the statement of facts.

Stringfellow v. Kain, 99 U. S., 610.
Gray v. Howe, 108 U. S., 12.
Haws v. Victoria etc. Co., 160 U. S., 303.
Marshall v. Burtis, 172 U. S., 630.

And upon the bill of exceptions whether, under the pleadings, the objections were well taken at the trial:

Idaho Land and Imp. Co. v. Bradbury, 132 U. S., 518.
Saline etc. Co. v. Saline etc. Co., 163 U. S., reading page 118.

Without these two papers the scope is narrowed down to the points of law arising on the record proper.

Harrison v. Perea, 168 U. S., S. C. Reporter, 311.

It becomes then very, very important to have the two papers referred to as this court cannot decide a case on the merits without them.

Argument.

The other quotations are so scant and meager that an examination reveals nothing bearing on the case. The entire theory of appellee is erroneous. His state of facts is wrong. The question is not what should be done should the lower court have done its duty and allowed this appeal and then a great delay happened without any

excuse therefor. But the true question is has this court the power in aid of its already acquired jurisdiction (which is not disputed), appellants having done everything in their power to perfect the record, to reach out by certiorari for the so-called statement of facts made and filed in the court below as a part of the record of this case? This court has the power, as we have shown, to compel the inferior courts to make such papers. Having such power it would hardly seem reasonable or just that it did not have the power to bring such paper to this court after it was made. We think it has it. Suppose the lower court should refuse to act at all in such case. Could it by any obstacle defeat the jurisdiction of this court? We hardly think so.

Neither do we think that this court will jump at the conclusion reached by appellee that it will affirm this judgment long before it has considered the record. There is a federal question appearing on the face of the pleadings, also a demurrer disposing of one of appellants' counterclaims on the record proper, both pure questions of law.

And when this so-called statement of facts is properly before this court it will raise the question whether it will sustain the judgment.

That appellants objected to the so-called statement of facts, and that "foreshadows plain purpose to seek in this court review of testimony" as charged by appellee is too superficial for comment. As we have shown, the testimony can only be examined by the avenue of a bill of exceptions, and then the court will see under the theory of the case whether the objections were well taken at the trial, but not for the purpose of seeing whether the evidence sustains the statement of facts.

Wherefore appellants submit that the motion should be sustained and the writ of certiorari ordered.

A. J. DAGGS,

Attorney for Appellants.